Supreme Court, U.S.
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No. 94-2113

In The

Supreme Court of the United States

October Term, 1995

TRANSPORTATION INSURANCE BROKERS, INC.,

Petitioner,

vs.

D. W. FERGUSON & ASSOCIATES,
DOUGLAS W. FERGUSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in the context of a challenge to the preservation of a general verdict following the abandonment of an included cause of action, *certiorari* is proper in a case based principally upon its unique factual record which demonstrates (a) overwhelming evidence in support of all remaining theories contained within the verdict; (b) substantial egregious conduct on behalf of the petitioning party; and (c) an on-the-record discussion between the court and jury further demonstrating the elimination of any possible jury confusion.

2. Whether the circuits truly are in such direct conflict on the preservation of general verdict issue, in light of the various formulations recognizing a limited exception to the general rule for facts such as those raised in this appeal.

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STATEMENT OF THE CASE

A. FACTUAL HISTORY

The facts of this case are egregious. Petitioner, TRANSPORTATION INSURANCE BROKERS, INC. ("TIB"), and respondents, D. W. FERGUSON & ASSOCIATES and DOUGLAS W. FERGUSON (collectively "Ferguson"), were insurance brokers competing for the business of LANCER INSURANCE COMPANY ("Lancer"). TIB was Lancer's largest producer and was responsible for 80% to 90% of Lancer's business on the

west coast. (RT 354:5 - 356:2.) Having previously acquired ATIS, its prior main competitor (RT 354:21 - 355:2), TIB embarked upon a campaign to destroy Ferguson, its principal remaining competition.

The record is replete with instances of TIB's attempts to injure Ferguson, most of which fall into three overlapping categories. First, TIB attacked Ferguson's business reputation. Larry Kalior ("Kalior"), one of TIB's owners, advised Lancer that Ferguson was unethical. (RT 738:5-9.) Lancer's own former vice president, John Lavin ("Lavin"), testified that both Kalior and Ron Geller ("Geller"), TIB's other owner, told him that Ferguson was "not trustworthy" and that he was a "scumbag." (RT 761:10 - 762:16.) Karen Cole ("Cole"), a TIB employee, conceded that she had heard Geller state that Ferguson "didn't take the best care of his customers." (RT 1117:18-22.)

Second, TIB attacked Ferguson's personal reputation. Lavin testified that Geller and Kalior told him and another marketing associate that Ferguson was a "homosexual" and "gay" and a "queer." (RT 762:7 - 763:14.) On another occasion, Kalior advised Lavin that he "should not sit next to Doug [Ferguson] because he's gay." (RT 764:7 - 765:6.) Cole admitted that Geller had referred to Ferguson as a homosexual. (RT 1117:14-15.)

Third, TIB attempted to interfere directly with Ferguson's relationship with Lancer. Geller and Kalior actually advised Lancer to "shut him down" and "let us write that business for you." (RT 767:10-18.) It was undisputed that TIB said "negative things about Doug Ferguson" to Lancer (RT 761:10-16) and that TIB advised Lancer that Ferguson was "negative selling." (RT 766:16 - 767:9.)

TIB's campaign succeeded. Despite the fact that Ferguson's business relationship with Lancer was highly advantageous to Lancer (who repeatedly acknowledged this fact (Exhibit 646; Exhibit 738; Ferguson ER at 1, 2)), Lancer terminated Ferguson in May of 1991.[1] (Exhibit 78; Lancer ER 4.) This termination was particularly surprising given the fact that only two months earlier Lancer had forwarded to Ferguson a summary of his five-year production history with Lancer (RT 890:8 - 891:9; Exhibit 85; Ferguson ER at 3), noting the steady increase in volume and that "the book has been good to us." Lancer's praise was not surprising, given the fact that Ferguson had doubled his production in one year and continued to improve his loss ratio. (RT 891:2-5.)

TIB, along with Lancer, then accelerated its efforts to destroy Ferguson's business as well as his reputation. In this regard, much of the trial consisted of testimony from Ferguson's customers who had been contacted by Lancer and TIB and advised that Ferguson had embezzled funds, had misappropriated funds and was a fraud. In an industry where a producer's reputation is paramount (RT 671:10-13), these malicious attacks, all of which were false, were devastating. As a result of the efforts of TIB and Lancer, Ferguson testified that he lost business, sustained damage to his reputation and suffered substantial physical and emotional distress.

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[1] While TIB's petition recites that "Lancer testified that its decision to terminate [Ferguson's] contract was not influenced by [TIB's] remarks" (Petition, P. 5), the jury's verdict confirms that they did not believe that testimony.

B. PROCEDURAL HISTORY.

Although Lancer initiated the litigation, Ferguson prevailed on his counterclaim against Lancer and third-party complaint against TIB. The jury awarded $128,800 in compensatory damages and $225,000 in punitive damages against Lancer and $72,900 in compensatory damages and $175,000 in punitive damages against TIB. All aspects of both awards were upheld by the trial court, despite lengthy post-trial motions filed on behalf of both parties. (CR 151.)

Based upon the litigation privilege under California *Civil Code* Section 47(b) (not applicable to TIB), the appellate court reversed the jury's verdict as to Lancer and awarded judgment on behalf of Lancer on Ferguson's tort claims. Ferguson's breach of contract claim against Lancer was remanded for retrial. Significantly, in evaluating its own limited exception to the general rule that a general verdict may not stand if any cause of action is tainted, the Ninth Circuit did not attempt to preserve the verdict against Lancer. That exceptional remedy was reserved for the verdict against TIB, where the evidence was so overwhelming and so egregious.

The verdict as to TIB was affirmed in all respects, the Ninth Circuit acknowledging the inapplicability of the litigation privilege as to TIB and articulating the various bases for preserving the general verdict as to TIB. (A-16.) On this petition, TIB does not challenge any aspect of the Ninth Circuit's ruling other than the general verdict issue.

TIB's petition is based upon the fact that in addition to finding for Ferguson on causes of action for interference with prospective economic damage, defamation (slander) and intentional infliction of emotional distress, the general verdict also encompassed a cause of action for unfair trade practices under California *Business and Professions Code* Section 17000, *et seq.*[2]

The trial court record provided the appellate court ample basis for affirming the verdict as to TIB despite the abandonment of the statutory claim. First, as TIB notes in its petition, the jury was asked a special interrogatory on the statutory claim, thereby setting apart that theory. More importantly, however, the appellate court in its opinion emphasized the fact that the jury specifically asked a question concerning the statutory claim which allowed the district court, through its answer, to eliminate any potential confusion which the abandoned claim might have caused. Page A-16 of the Ninth Circuit's opinion recites the following discussion between the court and the jury:

> (THE COURT): . . . The question about unfair trade practices is simply a question that we are asking you to answer. It has nothing to do with – this is a question that the court wants answered.

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[2] While performing additional research in preparation for the appeal, Ferguson concluded that the statutory claim was not actionable and the parties stipulated to dismiss Ferguson's cross-appeal encompassing that issue. In addition, Ferguson no longer sought to affirm that portion of the jury's verdict which granted relief on the basis of the statutory claim.

* * *

JUROR WORILLOW: Under "A" the question you want answered is just unfair trade practices, that has nothing to do with punitive damages or anything else?

THE COURT: That's right. That a separate question.

JUROR WORILLOW: Okay.

(Ninth Circuit Opinion, A-16.)

After rendering its opinion, the Ninth Circuit subsequently denied TIB's petition for rehearing. (A-17.) On July 10, it denied TIB's motion for stay of mandate. (Application for Stay, Exhibit 2.)

For similar reasons, this petition should be denied in its entirety. The case is unique, the factual record overwhelming. It contains a rare opportunity (on the record) for the trial court to dispel any potential confusion which the abandoned cause of action might have caused. Ferguson respectfully submits that if an appellate court is ever to be invested with the discretion to review a record and sustain a verdict based upon the overwhelming weight of the evidence, this appeal presents such a record. At the very least, this petition does not present circumstances under which this Court's limited review should be utilized.

REASONS FOR DENYING THE WRIT

A. THE NINTH CIRCUIT PROPERLY APPLIED ITS LIMITED EXCEPTION TO PRESERVE THE VERDICT AGAINST TIB.

In analyzing the verdict issue in its opinion below, the Ninth Circuit cited *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 777 (9th Cir. 1990), in stating the following:

> As a general rule, "a general jury verdict will be upheld only if there is substantial evidence to support each and every theory of liability submitted to the jury." *Syufy Enterprises v. American Multi-cinema, Inc.*, 793 F.2d 990, 1001 (9th Cir. 1986); *see also Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30, 82 S. Ct. 1130, 1135-36, 8 L. Ed. 2d 305 (1962). However, we may construe a general verdict as attributable to one of several theories if it was supported by substantial evidence and was submitted to ~~the~~ jury free from error. *Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir. 1980). The factors we must consider in deciding whether to exercise this discretion are: (1) the potential for confusion of the jury; (2) whether the losing party's defenses apply to the count upon which the verdict is being sustained; (3) the strength of the evidence supporting the count relied upon to sustain the verdict; and (4) the extent to which the same disputed issues of fact apply to the various legal theories. *Id.* at 938-39. *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 777 (9th Cir. 1990) (footnote deleted).

(Ninth Circuit Opinion, A-7.)

Though the Ninth Circuit chose not to preserve the verdict against Lancer because of the litigation privilege,

these facts presented a paradigm case for applying the limited exception as to TIB. The evidence was overwhelming on all counts. All of the remaining counts were free from reversible error. The same facts applied to all causes of action. In short, this record allowed the appellate court to conclude that the remaining causes of action were necessarily free from doubt.

This conclusion was bolstered by the discussion between the court and the jury in which the jury was specifically advised that the statutory claim was a "separate question" as fully set forth above. This unique record provided the appellate court with further evidence that any potential for confusion had been nullified. In short, the record below does not support the request for *certiorari*.

B. TIB HAS FAILED TO DEMONSTRATE THE NEED FOR GRANTING A WRIT IN THIS INSTANCE.

TIB's petition speaks in terms of substantial need and direct conflict in seeking a hearing before this Court. A review of the authorities cited by TIB reveals neither the need suggested by TIB's petition nor the fundamental conflict in approach. Instead, what has developed throughout the circuits is a uniform standard with a recognized though limited exception in the unique or exceptional case. This litigation represents precisely such a case.

1. The Ninth Circuit's Handling of the Issue.

Various authorities surveyed by TIB confirm the Ninth Circuit's adherence to this Court's general rule as well as its recognition of both the need for that rule and the appropriate basis for limited exception. Both the panel writing this opinion and the Ninth Circuit in general have demonstrated an awareness of the basic principles being advanced by this Court.

In this appeal, for instance, the panel not only cited to this Court's decision in *Sunkist Growers Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 82 S. Ct. 1130, 8 L.Ed. 2d 305 (1962), it also applied that general rule in its directions as to Lancer. Accordingly, that matter is being retried. It is therefore inappropriate for TIB to suggest that "the Court of Appeals did not address petitioner's argument that controlling Supreme Court authorities require reversal." (Petition, PP. 6-7.)

The underlying facts on TIB's appeal support a different result. No longer restricted by the litigation privilege, the Ninth Circuit was free to review the entire record and to reasonably conclude that the overwhelming weight of the evidence and particularly the character of that evidence would necessarily have caused the jury to find that TIB remained liable on the remaining causes of action. The trial court's discussion with the jury on the record further alleviated any concerns the appellate court might have had with regard to potential jury confusion. In short, the Ninth Circuit presumably realized that the appeal by TIB represented a perfect instance in which to depart from the general rule.

The Ninth Circuit has demonstrated the same discerning attitude generally. In many of the cases cited by TIB, the Ninth Circuit has acknowledged the general rule, citing *Sunkist* or other cases, and then chosen not to exercise its discretion to depart from that rule. For instance, in *Counts v. Burlington N. RR Co.*, 952 F.2d 1136 (9th Cir. 1991), the court cites *Sunkist*, acknowledges a potential exception under *Kern v. Levolor Lorentzen, Inc.*, but then chooses not to apply that exception. Similarly, in *Syufy Enterprises v. American Multi-cinema Inc.*, 793 F.2d 990 (9th Cir. 1986), the Ninth Circuit once again cites this Court's ruling in *Sunkist* and appropriately decides that the facts do not justify a departure from the general rule.

Two conclusions prevail from the Ninth Circuit's treatment of the general verdict issue. First, it has not "failed to address petitioner's argument" or otherwise ignored the issue. Second, it has exercised its limited discretion to depart from the general rule only where the facts are particularly egregious, as in this case.

2. Many of the Remaining Circuits Implement a Similar Approach.

TIB seeks to emphasize what it asserts is a "direct conflict" between the Ninth Circuit and "every other circuit" which has addressed this issue, but its survey of the law reveals a more uniform approach than its argument would suggest. Though different formulations appear, various circuits retain the discretion to preserve a general verdict, whether the concept utilized is "harmless error" or that the appellate court is "fairly convinced" or "reasonably certain" that the verdict was not influenced

by erroneous theories. *Morrissey v. National Maritime Union of America*, 544 F.2d 19 (2d Cir. 1976); *Simko v. C & C Marine Maintenance Co.*, 594 F.2d 960 (3rd Cir.), *cert. den.*, 444 U.S. 833 (1979); *Mueller v. Hubbard Milling Co.*, 573 F.2d 1029 (8th Cir.) *cert. den.*, 439 U.S. 865 (1978);[3] *Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652 (1st Cir. 1981).

TIB's assertion that the *Brochu* decision represents the only instance in which the general verdict was actually preserved does nothing but weaken its argument before this Court as it reflects the circuits' overwhelming adherence to the general rule. Ferguson does not suggest that every court in every circuit should automatically preserve a general verdict in each instance. Ferguson does contend, however, that in accordance with the various circuit court decisions listed in the petition, the appellate court should be invested with the discretion to depart from the general rule in the exceptional case where the record demands such relief. This appeal represents such a case.

C. THE PETITION SHOULD BE DENIED BECAUSE THE JURY, THE TRIAL COURT AND THE APPELLATE COURT REACHED THE RIGHT RESULT.

The focus of this opposition has been to demonstrate the unique factual nature of this appeal and in particular the character of TIB's conduct which has had a substantial impact on the jury, the trial court and the appellate

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[3] *Certiorari* was also denied by this Court in *McGrath v. Zenith Radio Corp.*, 651 F.2d 458, 464 (7th Cir.), *cert. den.*, 454 U.S. 835 (1981).

court. In reaching its unanimous result and awarding punitive damages, the jury was necessarily moved by TIB's conduct. The trial court listened to the evidence and then summarily denied all post-trial motions. Even the appellate court in its written opinion took pains to recite certain of the more egregious factual allegations emphasized in this brief in opposition. (*See* A-11.)

Separate and apart from the fact that this petition should be denied because its facts reject universal application, it should be denied because, at least as to TIB, the appellate court reached the right result. The record fully justified recovery on all tort theories submitted. TIB does not raise any further legal error on this petition. Accordingly, this Court should not exercise its limited review in this particular case.

CONCLUSION

For the reasons stated, the petition should be denied in its entirety.

Dated: July 25, 1995

Respectfully sumbitted,

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